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Counterclaim-Plaintiff  
ARIOSA DIAGNOSTICS, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

VERINATA HEALTH, INC.,  
Plaintiff and  
Counterclaim-Defendant,

VS.

ARIOS A DIAGNOSTICS, INC.,  
Defendant and  
Counterclaim-Plaintiff.

Lead Case No. 3:12-cv-05501-SI  
Case No. 3:14-cv-01921-SI  
Case No. 3:15-cv-02216-SI

**ARIOSIA DIAGNOSTICS, INC.'S BRIEF  
IN SUPPORT OF ITS OBJECTION TO  
PLAINTIFFS' PROPOSED  
INTRODUCTION OF DEPOSITION  
TESTIMONY OF XIANG-DONG FU  
FROM POST-GRANT PROCEEDINGS  
AT TRIAL**

ILLUMINA, INC.,

## Plaintiff and Counterclaim-Defendant

VS.

ARIOSA DIAGNOSTICS, INC.,

### Defendant and Counterclaim-Plaintiff.

Judge: Hon. Susan Illston

1 ILLUMINA, INC., )  
2 )  
3 Plaintiff and Counterclaim- )  
4 Defendant )  
5 vs. )  
6 ARIOSIA DIAGNOSTICS, INC., )  
7 Defendant and Counterclaim- )  
8 Plaintiff. )  
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1 Ariosa Diagnostics, Inc. hereby submits this brief in support of its objection to the  
 2 introduction of irrelevant, hearsay statements from Xiang-Dong Fu, Ph.D. Plaintiffs intend to  
 3 present Dr. Fu's statements about a *different* assay through its expert, Gregory Cooper, Ph.D., as  
 4 purported support for Dr. Cooper's infringement opinions. Dr. Fu's statements are hearsay for  
 5 which no exception applies, irrelevant, and would be highly prejudicial, confusing, and  
 6 misleading. Fed. R. Evid. 402, 403, 802, 805. Additionally, it is improper as Dr. Fu lacks  
 7 percipient knowledge and has not been designated as either a fact or expert witness in this case.  
 8 Fed. R. Evid. 602, 702, 703.

9 During an IPR proceedings regarding the '794 patent, Ariosa presented expert opinions  
 10 from Dr. Fu. As part of his role, he did not receive or become familiar with the functionality or  
 11 details of the Harmony Prenatal Test. Yet, Plaintiffs intend to use Dr. Fu's testimony *speculating*  
 12 on the way in which a *different* assay of a solution of DNA into which streptavidin beads and  
 13 probes are introduced to argue that this same order occurs in Harmony's assay. This is improper.

14 First, Dr. Fu's testimony is irrelevant. Dr. Fu was not speaking about the Harmony test and  
 15 did not know the conditions under which the Harmony test is or was performed. Dr. Fu even  
 16 qualified his statement as limited to the particular assay about which he was speaking—stating,  
 17 “[i]n this *particular* case, Streptavidin, Biotin direction will take place first.” Ex. 1 (Pls.  
 18 Demonstrative) at slide 83; Ex. 2 (Fu Depo. Tr.) at 198:12-13. Rather than being in reference to  
 19 the Harmony Test, Dr. Fu's statement was in regard to an assay described in a patent application  
 20 filed jointly by UCSD and Illumina—the '946 application. Ex. 2 (Fu Depo. Tr.) at 194:3-4  
 21 (discussing experiments in “[Dr. Fu's] 2002 article”); *id.* at 194:14 (“[Dr. Fu's] '946 application”);  
 22 *id.* at 196:14-15 (“In *this* assay, we – based on *our* design, we envisioned this process...”).  
 23 Plaintiffs do *not* even allege that the assay being discussed by Dr. Fu and the Harmony Test assay  
 24 are run under the same conditions, which the same ratios of DNA, resulting in the same kinetics  
 25 and biological activity. Dr. Fu did not have any percipient knowledge of the Harmony Test, and  
 26 his testimony—even if qualified as a witness in this case, which he is not—is inadmissible as  
 27 unreliable. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993); *M.H. v. County of*  
 28 *Alameda*, No. 11-cv-02868-JST, 2015 U.S. Dist. LEXIS 12081, at \*6 (N.D. Cal. Feb. 1, 2015)

1 (“Expert testimony based on mere ‘subjective belief or unsupported speculation’ is  
2 inadmissible.”).

3 Second, Dr. Fu’s testimony is highly prejudicial. Plaintiffs wish to present his speculative  
4 testimony based on a hypothetical to the jury as an expert opinion, even captioning the testimony  
5 as being by an “Ariosa Expert Witness.” Ex. 1 (Pls. Demonstrative) at slide 83. Dr. Fu lacked any  
6 familiarity with the Harmony Test at the time of his deposition and was *not* discussing the  
7 Harmony Test, yet Plaintiffs attempt to present his testimony as being specifically *directed*  
8 towards the Harmony Test. Statements concerning the biochemical function of one assay, (“... In  
9 this particular case, Streptavidin, Biotic direction will take place first.”), is not probative of the  
10 biological activity of a different assay (*i.e.*, the Harmony Prenatal Test).

11 Dr. Fu is neither a percipient or expert witness in this case. His statements are hearsay for  
12 which there is no exception. Further, Plaintiffs did not include Dr. Fu in *any* Rule 26 disclosure  
13 and Ariosa only first became aware that Plaintiffs were going to seek to present Dr. Fu’s testimony  
14 at trial on November 13, 2017, well after the close of fact and expert discovery. Plaintiffs since  
15 dropped Dr. Fu from their witness list, but now intend to present Dr. Fu’s testimony to the jury as  
16 an “Ariosa Expert Witness.” But Ariosa did not designate Dr. Fu as a witness in this case, he has  
17 not testified at trial, *See* FRE 801, 402, 701, 702; *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147,  
18 164 (3d Cir. 1995) (non-testifying expert testimony is inadmissible hearsay); *Macuba v. Deboer*,  
19 193 F.3d 1316, 1323 (11th Cir. 1999) (holding same), and the statements do not even pertain to  
20 the functionality of the assay at issue in this case. Fed. R. Evid. 402, 403, 602, 703. Finally, Dr.  
21 Cooper’s alleged reliance on Dr. Fu’s statements does not make them admissible. Dr. Cooper is  
22 merely repeating Dr. Fu’s out-of-context statement and improperly connecting them to Harmony  
23 Test. This is misleading and prejudicial.

24 Ariosa therefore objects to the admission of Dr. Fu’s testimony under Rules 402, 403, 602,  
25 702, 703, 802, and 805 of the Federal Rules of Evidence.

1 Dated: January 14, 2018

Respectfully submitted,

2 IRELL & MANELLA LLP

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4 By: /s/ Sandra L. Haberny  
Attorneys for Defendant and Counterclaim-  
5 Plaintiff ARIOSIA DIAGNOSTICS, INC.  
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